IN THE

Supreme Court of the United States

October Term, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant)

and

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT STEAMSHIP YAKA ON THE MERITS.

THOMAS F. MOUNT,
HARRISON G. KILDARE,
1910 Packard Building,
Philadelphia 2, Pa.,
Counsel for Respondent, Steamship Yaka.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

STATUTES AND AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 509

ELIJAH REED,

Petitioner

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),

AND

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

BRIEF FOR RESPONDENT STEAMSHIP YAKA ON THE MERITS.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW.

May a vessel be held liable in rem for damages arising from shipboard injury to a longshoreman, caused by an unseaworthy condition created by the demise charterer who is also the longshoreman's employer?

COUNTER-STATEMENT OF THE CASE.

Steamship YAKA, owned by Waterman Steamship Corporation, was delivered under a demise charter to Pan-Atlantic Steamship Corporation on March 19, 1956. Petitioner was injured on March 23, 1956, while employed by the demisee to load cargo aboard the ship at Philadelphia.

The trial judge found that the accident occurred because of the defective condition of a pallet which Pan-Atlantic's longshoremen were using as a platform in the hold to expedite their work. The pallet was not part of the regular equipment of the vessel. It had not been aboard the vessel when the ship was delivered to the demise charterer six days previously. On the contrary, the evidence was undisputed that the wooden pallet was a loading device owned and furnished by the demisee, and used to transfer drafts of cargo from shore into the hold of the vessel on the day of the accident.

Petitioner sued Waterman Steamship Corporation as owner, alleging that the duty to furnish a seaworthy ship and equipment was absolute and non-delegable, even where the unseaworthy condition was created by the demisee and did not exist at the time of the demise. This contention was rejected by the District Court on peremptory exception to the libel, but the exception was dismissed on the ground that evidence might be presented at trial to disclose some connection between the shipowner and the faulty equipment.

Petitioner thereupon instituted the present action in rem against the vessel, which impleaded the demise charterer. The suit *in personam* and the separate action *in rem* were consolidated for purposes of trial, and at the close of the testimony the trial judge granted the motion of Waterman Steamship Corporation for dismissal of the *in personam* suit since it was clear that the unseaworthy condition had been created entirely by Pan-Atlantic Steamship Corporation.

Since there was no appeal from the judgment in favor of the shipowner *in personam*, this constitutes a final adjudication as to the non-liability of Waterman.

Thus recognizing that there was no *in personam* liability on the part of Waterman as shipowner, the trial judge nevertheless found Steamship YAKA liable *in rem* and allowed full indemnity in favor of the ship against the demisee because of Pan-Atlantic's implied warranty to the owner to return the vessel free of liens, and also to make use of it in a safe, proper and workmanlike manner. *Crumady v. The J. H. Fisser*, 358 U. S. 423 (1959); *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation*, 350 U. S. 124 (1956). (70a, 71a)

Pan-Atlantic appealed on the ground that its status as demise charterer was tantamount to ownership (see *Guzman v. Pichirilo*, 369 U. S. 698 (1962)) and that the fiction of an independent *in rem* liability could not be utilized to circumvent the protection afforded a stevedore employer by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code, Section 901 et seq. The Third Circuit had already decided that the registered owner of a vessel who performed his own stevedoring could not be deprived of this protection by the device of attaching his vessel on the theory of a maritime lien. *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1952), certiorari denied 345 U. S. 908 (1953).

Steamship YAKA likewise appealed to protect its position on the separate judgment for indemnity.

The Court below reversed the District Court, holding that petitioner had attempted to use the procedural device of a libel *in rem* against a ship for injury in the absence of "any underlying obligation of anyone" to respond in damages.

Although in either event Steamship YAKA will not be required to bear the loss, it is the position of this respondent that the conclusion of the Court below was correct as a matter of law.

ARGUMENT.

I. Personification of Vessels Is an Archaic Fiction of the Admiralty Law Which by Numerous Exceptions Has Been Robbed of Its Validity.

The figurative personality of a ship, aside from its appeal as a literary metaphor, has lost its effectiveness as a reliable fiction in the law of admiralty. The concept of the ship has been rationalized through a century of litigation from a juristic personality endowed with power to commit torts and incur debts into a means of affording relief from some breach of duty committed by the shipowner or those in lawful possession.

Personification in American admiralty law can be traced to three early cases where the ship was forfeited under criminal statutes. Chief Justice Marshall in *The Little Charles,*[1] and Mr. Justice Story in *The Palmyra*[2] and in *Brig Malek Adhel,*[3] upheld statutory provisions permitting seizure of the vessel when used for unlawful purposes, despite the innocence of her owner, as a proper exercise of federal police power under the due process clause of the Constitution. These cases were not concerned with enforcement of maritime liens.

In *The Nestor,*[4] an early maritime lien case involving indebtedness for supplies, Mr. Justice Story likened the lien to the Roman "pawn" or "hypothecation" but indicated that the debt, whatever its traditional roots may have been, was incurred by living persons rather than the ship.[5] Other

1. 26 Fed. Cas. 979, Case No. 15,612 (C. C. D. Va. 1819).
2. 12 U. S. (12 Wheat.) 1 (1827).
3. 43 U. S. (2 How.) 210 (1844).
4. 18 Fed. Cas. 9, Case No. 10,126 (C. C. D. Me. 1831).
5. Learned Hand, J. in *Burns Bros. v. The Central R. R. of New Jersey*, 202 F. 2d 910, 912 (C. A. 2, 1953), ascribed the *in rem* liability of ships to the antiquated 18th Century concept of English law that "guilt attaches to the thing," so that an instrument causing death was forfeit to the crown as deodand, citing Holmes, The Common Law, pp. 24, 25 and Pollock & Maitland, Vol. II, pp. 470-473. Judge Hand characterized the ship's "personal" liability for maritime liens as a "vestigial devolution."

early lien cases found no need to resort to the fiction of the ship's personality. See *The Rebecca*,[6] *Young Mechanic*,[7] and comment in Gilmore & Black, The Law of Admiralty, (1957), Chap. IX, page 488.

The conceptual convenience of the ship's personality, when confronted with situations where it would work manifest injustice, produced anomalous results. Although this Court held in *The China*, 74 U. S. (7 Wall.) 53 (1868), in *The Siren*, 74 U. S. (7 Wall.) 152 (1868), and in *The Barnstable*, 181 U. S. 464 (1901), that a vessel is liable independently of her owner for the negligence of anyone who is "lawfully in possession of her, whether as owner or charterer," a departure from strict adherence to personification appeared in *The Western Maid*, 257 U. S. 419 (1922), where Holmes, J. held that ships on charter to the federal government, itself immune as sovereign from liability *in personam*, were not subject to a maritime lien for collision damage, even after the charter term had ended and they had been restored to the possession of their owners.[8]

In *New York Dock Co. v. S. S. Poznan*, 274 U. S. 117 (1927), this Court referred to "the general rule that there can be no maritime lien for services furnished a vessel while *in custodia legis*." Substantial justice was done in this instance by granting recovery "in equity and good conscience."

Practical justice, equity and good conscience impelled this Court to disregard the ship's "personal" accountability in *Continental Grain Co. v. Barge FBL-585*, 364 U. S. 19 (1960). This involved the transfer of *in rem* proceed-

---

6. 20 Fed. Cas. 373, Case No. 11,619 (D. Me. 1831).

7. 30 Fed. Cas. 873, Case No. 18,180 (C. C. D. Me. 1865).

8. That same year the English Privy Council reached a similar conclusion in *The Tervaeté* (1922) P. 259. Scrutton, L. J., stated: "In my view it is now established that procedure in rem is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property." This Court had already recognized the growing divergence of English law in *The Barnstable*, *supra*, at page 467.

ings against the ship from the district where it had been attached into a more convenient forum in the district where the *in personam* action against her owners was already pending. Recognizing the inconvenience of defending *in rem* in Louisiana and *in personam* in Tennessee, the Court followed "the common sense approach" by allowing the transfer under 28 U. S. Code, Section 1404(a), noting "admiralty's approach to do justice with slight regard to formal matters" and that "admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from the other federal practices." See *The Duke of York-British Transport Commission v. United States*, 354 U. S. 129, 139 (1957).

In the foregoing situations, treating the ship as an entity with a fictional personality separate from her owners or those having lawful possession would logically have compelled a different result. This can be taken a step farther, to the situation where the "offending vessel" is manned by pirates, thieves, mutineers, or other unauthorized persons. Even Brown, J. in *The Barnstable, supra*, while supporting the fiction, concedes it does not go so far.[9]

Personification, strictly followed, would limit *in rem* recovery to the value of the *res*, either the vessel under attachment or the bond stipulated for its release. However, this has been disregarded by many lower courts. Where the sum decreed *in rem* exceeded the sale or stipulated value of the ship, such courts have granted recovery for the excess *in personam* against the owner. See *The Monte A.*, 12 Fed. 331 (S. D. N. Y., 1882); *Minnetonka*, 146 Fed. 509 (C. A. 2, 1906); *The Susquehanna*, 267 Fed. 811 (C. A. 2, 1920); *The Fairisle*, 76 F. Supp. 27, 1948 A. M. C. 794 (D. Md.), affirmed 171 F. 2d 408 (C. A. 4, 1948); *Mosher v. Tate*, 182 F. 2d 475, 1950 A. M. C. 1106 (C. A. 9); and *Logue Steve-*

9. See 181 U. S. at page 46, where the Court held that the ship was "personally" liable for the negligence of anyone who is "lawfully in possession."

doring Corp. v. The Dalzellance, 198 F. 2d 369 (C. A. 2, 1952), where *in personam* recovery was denied in the absence of an amendment to the *in rem* pleadings.

In the precedent which the Court below regarded as controlling in the present case (86a-87a) the Third Circuit held that an injured longshoreman could not circumvent the exclusive remedy provisions of the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. Code, Sections 901 et seq., by proceeding against the vessel *in rem* when the shipowner was also his stevedore employer. *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1952), certiorari denied 345 U. S. 908 (1953). The court looked through the fiction of "the so-called independent personality of the ship" and recognized that an action against the vessel is "realistically" an action against the owner (at page 850). This conclusion was cited and followed in *Pichirilo v. Guzman*, 290 F. 2d 812, 815 (C. A. 1, 1961), reversed on other grounds in *Guzman v. Pichirilo*, 369 U. S. 698 (1962); *Larsen v. The M/V Teal*, 193 F. Supp. 508, 511 (D. Alaska, 1961); *Conzo v. Moore McCormack Lines*, 114 F. Supp. 956, 959 (S. D. N. Y., 1953); and *Bennett v. The Mormacteal*, 160 F. Supp. 840, 841 (E. D. N. Y., 1957). The same result had previously been reached in *Samuels v. Munson S. S. Line, Inc.*, 63 F. 2d 861 (C. A. 5, 1933), and in *Vitozi v. S. S. Platano*, 1950 A. M. C. 1686 (S. D. N. Y.).

One would likewise suppose that, if the vessel is independently accountable for torts committed by those lawfully in possession, an *in personam* proceeding dismissed on the merits would not bar an *in rem* action against her owners for the same negligent acts of her master, officers or crew. In *Burns Bros. v. The Central R. R. of New Jersey*, 202 F. 2d 910 (C. A. 2, 1953), the appellate court disagreed, holding that a decree *in personam* bars a subsequent suit *in rem* on the principle of res judicata. Granting that "it has from the beginning been true that in suits *in rem* the vessel has been regarded as the tortfeasor," Learned Hand, J. characterized the fiction as "atavistic habit," and said (at page 913):

> "* * * Disputes arise between human beings, not inanimate things; and it would be absurd to give the beaten party another chance because on second trial he appears as the claimant to *a vessel that is, and can be, nothing but the measure of his stake in the controversy.*" (Emphasis supplied.)

In *Carlotta*, 48 F. 2d 110, 112, 1931 A. M. C. 742, 745 (C. A. 2), Judge Hand had criticized the fiction as "archaic," "an animistic survival from remote times," "irrational," and "atavistic." His impatience with the doctrine aligned him with this Court in *City of Norwich*, 118 U. S. 468 (1886), where it was said (at page 503):

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, * * *."

In *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U. S. 249 (1943), at pages 253-254, this Court referred to the foregoing comment in *City of Norwich*, and stated:

> "The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. * * * Congress has said that the owner shall not 'answer for' this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? * * *."

It has been said that personification of the vessel, "treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court." *Canadian Aviator, Ltd. v. United States*, 324 U. S. 215, 224 (1954). Recognition has not dictated literal adherence to a fiction which would have upset many of this Court's past decisions. The entity concept has been emasculated by logical exceptions to the point where it no longer stands as an impregnable doctrine of maritime law when it is found to be in conflict with over-riding considerations of practical justice, equity and good conscience.[10]

II. The Court Below Was Correct in Holding That a Maritime Lien Depends Upon Some Underlying Personal Obligation of the Shipowner or Other Person Lawfully in Possession of the Ship.

In *Rock Island Bridge*, 73 U. S. (6 Wall.) 213, 215 (1867), this Court laid down the rule that a maritime lien and a proceeding *in rem* are correlative—"where one exists, the other may be taken and not otherwise." This was confirmed in *The Resolute*, 168 U. S. 437 (1897), and in *Plamals v. The Pinar del Rio*, 277 U. S. 151 (1928), where it was held that a seaman cannot maintain an *in rem* action to enforce his rights under the Jones Act, 46 U. S. Code, Sections 688 et seq., because that statute did not create a maritime lien.

If this Court should reverse the Court below by finding that a maritime lien was created without any personal lia-

10: "It may be concluded that the fiction of the ship's personality has never been much more than a literary theme. As such it reached a height of popularity toward the turn of the century. Since then even as literature it has fallen into disrepute, thanks in part to the influence of Holmes and Learned Hand. Fictions serve many useful purposes in the law. Initially their introduction is apt to be a sign of disturbance and growth. But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed." Gilmore & Black, The Law of Admiralty, (1957), Chap. IX, page 510.

bility of the shipowner or demisee, as petitioner requests, it would condone the confiscation of property for a private wrong. This the Court has often said should not be done under the guise of an archiac fiction. *The Western Maid, supra.* "In the matter of liability, a man and his property cannot be separated." *City of Norwich, supra.* "There could be no practical exoneration of the owner that did not at the same time exempt his property." *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, supra.*

Petitioner asks the Court to adopt the view expressed by Learned Hand, J. in *Grillea v. United States*, 232 F. 2d 919, 924 (C. A. 2, 1956): "* * * we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'." Yet, Judge Hand had previously criticized personification in the strongest terms (*Carlotta* and *Burns Bros. v. The Central R. R. of New Jersey, supra*); and later he appears to have renounced his own view in *Grillea* by stating in *Latus v. United States*, 277 F. 2d 264, 267 (C. A. 2, 1960):

> "* * * We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner, when that fault is not that of a 'bareboat' charterer, or of some specified class of person like a compulsory pilot."

This Court has held that a proceeding *in rem* is "a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited." *Boyd v. United States*, 116 U. S. 616, 637 (1886).

The Third Circuit looked through the "so-called independent personality of the ship" to prevent an injured longshoreman from avoiding the exclusive remedy provisions of the Longshoremen's Act when his stevedore em-

ployer was also the shipowner in *Smith v. The Mormacdale, supra.* The same principle applies in the present case, where the stevedore employer was the demised owner of the vessel, having rights tantamount to actual ownership. *Guzman v. Pichirilo, supra,* at 369 U. S. 699-700. The demisee, or bareboat charterer, acquires as a concomitant of these rights certain obligations, including the non-delegable duty to furnish safe appliances and equipment, subject to the same warranty of seaworthiness of vessel and gear as the owner would be if he were in actual control of the ship.

In *Vitozi v. Balboa Shipping Co., Inc.,* 69 F. Supp. 286, 289 (D. Mass., 1946), the court found nothing in *Seas Shipping Co. v. Sieracki,* 328 U. S. 85 (1946), which "intimates that the obligation of seaworthiness of a ship is imposed on anyone except the owner in control of the ship." On appeal, the First Circuit agreed that for the purpose of maintaining a seaworthy vessel the demisee was in effect the owner, in conformity with cited precedents and "application of general principles of maritime law with respect to demise charters." 163 F. 2d 286, 289 (C. A. 1, 1947).

This was also the position of the Second Circuit in *Cannella v. Lykes Bros. S. S. Co.,* 174 F. 2d 794, 795 (C. A. 2, 1949). In the separate action brought against the demisee, the Second Circuit considered fact issues without questioning the charterer's obligation to furnish a seaworthy vessel. *Cannella v. United States,* 179 F. 2d 491 (C. A. 2, 1950). In *Grillea v. United States,* 229 F. 2d 687, 689-690 (C. A. 2, 1956), where the suit was brought *in personam* against the shipowner, Judge Hand exonerated the owner "who had done no more than put the demisee into possession of the ship" whereas the responsibility rested upon the demisee "on whose initiative and for whose profit the venture had been undertaken."

Where the negligence causing injury to a shipyard workman engaged in rebuilding a ship was solely attributable to his employer, who was protected by the Longshoremen's Act, the court found no basis for *in rem* lia-

bility against the vessel because the shipowner was a "wholly innocent third party." *Pedersen v. The Bulklube*, 170 F. Supp. 462, 467 (E. D. N. Y., 1959), affirmed 274 F. 2d 824 (C. A. 2, 1960), certiorari denied, 364 U. S. 814 (1960).

The fiction of ship's personality was firmly rejected by the Fourth Circuit in *Noel v. Isbrandtsen Company*, 287 F. 2d 783 (C. A. 4, 1961). The court indicated how fully it accepted the position of the Third Circuit by pointing out that the Second Circuit in *Grillea* does not derive support from *The Barnstable, supra*, and was later limited, if not in effect overruled, by Judge Hand in *Latus v. United States, supra.*

This Court has already observed that the Third Circuit had aligned itself with the position of the First Circuit on this question. *Guzman v. Pichirilo, supra*, footnote 2. It is evident that the Fourth Circuit has reached the same conclusion in *Noel v. Isbrandtsen Company*, and that the Second Circuit has taken a definite turn in that direction.

Contrary to the view generally held that the demisor warrants only the seaworthiness of his vessel as it exists at time of delivery under demise, Chief Judge Biggs in his dissent to the denial of petitioner's request for rehearing stated: "A bareboat charter cannot insulate the ship owner from liability. The Supreme Court again and again has held that the ship owner has a non-delegable duty to maintain the vessel in a seaworthy condition" (101a-102a). No authorities were cited for thus imposing an impossible burden upon shipowners, whose demised vessels are frequently out of their possession and control for months at a time. At any event, the personal non-liability of the shipowner is res judicata in this proceeding, no appeal having been taken from the dismissal of the petitioner's separate action *in personam* against Waterman Steamship Corporation.

CONCLUSION.

Petitioner asks this Court to reject the position of the First, Third, and Fourth Circuits, and the trend indicated in the Second Circuit, by reversing the Court below and permitting virtual confiscation of the shipowner's property—his vessel—as the result of personal injury for which he is not liable under the law.

The shipowner is not, and should not be, bound to warrant the seaworthiness of his vessel to the world against defective appliances and equipment brought aboard the vessel by a bareboat charterer in carrying out its own business during the term of the demise.

This accident occurred during March, 1956. The libel was not filed until March, 1958; it was brought to trial on issues of liability in January, 1960; and damages were eventually stipulated without further trial in January, 1961 (1a, 3a, 4a). Appellate proceedings then followed. The right of indemnity may be slight recompense to an owner-demisor whose vessel is sold under attachment in a distant port, or whose funds are tied up pending prolonged litigation, over a claim in which he is a wholly innocent party.

The sole justification advanced by petitioner for reversing the Court below is the fiction of ship's personality, which has lost its effectiveness through logical exceptions and has been rejected by this Court and by the lower courts when confronted with considerations of practical justice, equity, and good conscience. Such considerations in the present case require recognition that "a man and his property cannot be separated" and that "there could be no practical exoneration of the owner that did not at the same time exempt his property," as this Court has previously decided.

The undisputed fact that the actual wrongdoer was the demisee, who is protected in this instance by the provisions of the Longshoremen's and Harbor Workers' Compensa-

tion Act, makes it even more unjust to resort to the shipowner's property.

For these reasons, the decision of the Court below should not be disturbed.

WHEREFORE, respondent Steamship YAKA respectfully prays that the judgment of the Court of Appeals for the Third Circuit may be affirmed.

Respectfully submitted,

THOMAS F. MOUNT,
HARRISON G. KILDARE,
Counsel for Respondent,
Steamship Yaka.